C-8353 SUPREME COURT OF TEXAS CASES 001
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. V. KIRBY, 1988-89
WILLIAM, ET AL. (3RD DISTRICT)

MISCEL-
LANEOUS

NO. C 8353

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD I.S.D., et al.,

Petitioners,

V.

WILLIAM KIRBY, et al.,

Respondents.

MOTION TO INCLUDE NON-DOCUMENTARY EXHIBITS IN APPELLATE RECORD ON APPLICATION FOR WRIT OF ERROR

Petitioners, Edgewood I.S.D., et al., make this motion to include several non-documentary exhibits, admitted into evidence at trial, as part of the record on application for writ of error to the Honorable Supreme Court of Texas. In support of this motion the Petitioners respectfully show:

I.

This application for writ of error, to be submitted to the Court by February 3, 1989, arises from an adverse ruling in the Texas Court of Appeals for the Third Supreme Judicial District, entitled Edgewood v. Kirby, and numbered 3-87-190-CV.

II.

Several of the exhibits introduced into evidence at trial are not "documentary," and are therefore not automatically included in the record according to Texas Rule of Appellate Procedure 132(a). However, the aforementioned exhibits, consisting of photographs, books and charts, are essential to an understanding of the case.

III.

The following exhibits, as they were identified at trial, are not "documentary":

1. Plaintiff's exhibit 45, described as a book entitled Rich Schools Poor Schools, by Arthur Wise,
2. Plaintiff's exhibit 101, a large chart showing nominal cost per redefined ADA,
3. Plaintiff's exhibit 102, a large chart showing taxable value per student unit,
4. Plaintiff's exhibits 103, 104, 106, and 107, all large charts,

5. Plaintiff-Intervenors' exhibit 219, a photograph of girls bathroom,

6. Plaintiff-Intervenors' exhibit 220, a photograph of a classroom used for two classes,

7. Plaintiff-Intervenors' exhibit 222, a photograph of a water fountain,

8. Plaintiff-Intervenors' exhibit 223, a photograph of a room where first-aid materials are kept,

9. Plaintiff-Intervenors' exhibit 224, a photograph of a work area for teachers,

10. Plaintiff-Intervenors' exhibit 225, a photograph of an ice cream freezer,

11. Plaintiff-Intervenors' exhibit 225A, a photograph of a third grade classroom,

12. Plaintiff-Intervenors' exhibit 226, a photograph of a classroom,

13. Plaintiff-Intervenors' exhibit 228 and 229, photographs of cafeterias,

14. Plaintiff-Intervenors' exhibit 230, a photograph of a playground,

15. Plaintiff-Intervenors' exhibit 231, a photograph of a carpet in a hall,

16. Plaintiff-Intervenors' exhibit 232, a photograph of the ceiling in a classroom,

17. Plaintiff-Intervenors' exhibit 233, a large pad of charts,

18. Plaintiff-Intervenors' exhibit 235, a small book entitled School Board Member's Library, The Basics of Texas Public School Finance,

19. Plaintiff-Intervenors' exhibit 241, a general highway map including ValVerde County, the Texas Education Agency District in Square miles and by County,

20. Plaintiff-Intervenors' exhibit 242, a general highway map including Hudspeth County, Texas, the Texas Education Agency District by square miles and by county,

21. Plaintiff-Intervenors' exhibit 243, a general highway map of Kerr County, Texas,

22. Plaintiff-Intervenors' exhibit 244, a general highway map for Lamb County and Hockley County,

23. Plaintiff-Intervenors' exhibit 245, a general highway map for Potter County, Texas Education Agency District in square miles and by County,

24. Plaintiff-Intervenors' exhibit 246, a general highway map of Nueces County,

25. Plaintiff-Intervenors' exhibit 301A, a photograph of a special education administration building,

26. Plaintiff-Intervenors'exhibit 301B, a photograph of the administration building of Carrollton Farmer's Branch I.S.D.,

27. Plaintiff-Intervenors' exhibit 301C, 301F, 301I, 301J, and 301K, photographs of Turner High School, its library, auditorium and gymnasium,

28. Plaintiff-Intervenors' exhibit 301L, and 301M, photographs of the cosmetology classroom and agricultural section at Carrollton Farmer's Branch,

29. Plaintiff-Intervenors' exhibit 301Q, a photograph of the Auto Shop at Turner High School,

30. Plaintiff-Intervenors' exhibit 303A-G, seven (7) photographs of South San Antonio Schools,

31. Plaintiff-Intervenors' exhibit 304A-F, twenty-four (24) photographs of Southside Junior High in San Antonio,

32. Plaintiff-Intervenors' exhibit 306A-I, nine (9) photographs of El Jardin Elementary School in Brownsville,

33. Plaintiff-Intervenors' exhibit 307A-G, seven (7) photographs of Clearwater Elementary School in Brownsville,

34. Plaintiff-Intervenors' exhibit 308A-Z, twenty-four (24) photographs of Edgewood High School,

35. Plaintiff-Intervenors' exhibit 309A-M, thirteen (13) photographs of Gardendale Elementary School in Edgewood I.S.D.,

36. Plaintiff-Intervenors' exhibit 311A-J, ten (10) photographs of Putegnat Elementary School in Brownsville, and

37. Plaintiff-Intervenors' exhibit 312A-J, ten (10) photographs of Central Intermediate School in Brownsville,

IV.

A copy of this motion to include non-documentary exhibits in appellate record was filed with the Clerk of the Court of Appeals for the Third Judicial District on the 24th day of January, 1989.

WHEREFORE, the Petitioners respectfully pray that this Honorable Court grant this motion and include the above non-documentary exhibits in the appellate record.

DATED: January 23, 1989

Respectfully submitted,

ANTONIA HERNANDEZ
E. RICHARD LARSON
NORMA V. CANTU
JOSE GARZA
JUDITH A. SANDERS-CASTRO
ALBERT H. KAUFFMAN
GUADALUPE T. LUNA
Mexican American Legal Defense
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ALBERT H. KAUFFMAN
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DAVID HALL
Texas Rural Legal Aid, Inc.
259 S. Texas
Weslaco, TX 78596

ATTORNEYS FOR PETITIONERS
EDGEWOOD I.S.D., et al.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Include Non-Documentary Exhibits in Appellate Record on Application for Writ of Error has been sent on this 23rd day of January 1989 by certified mail return receipt requested to all counsel of record.

Albert H Kauffman

ALBERT H. KAUFFMAN

ATTORNEY FOR PETITIONERS

C 8353

No. _____

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.

Petitioners

V.

WILLIAM KIRBY, ET AL.,

Respondents

MOTION TO SUBSTITUTE CLEARER COPIES

OF APPLICATION FOR WRIT OF ERROR

COME NOW Petitioner-Intervenors, Alvarado Independent School District, et al., and file this Motion to Substitute Clearer Copies of Application for Writ of Error. In support thereof, Petitioner-Intervenors would respectfully show as follows:

I.

For the convenience of the Court, Petitioner-Intervenors Alvarado Independent School District, et al., request that the enclosed copies of Petitioner-Intervenors' Application for Writ of Error be substituted for the copies filed with the Court of Appeals on February 3, 1989. The briefs filed were not photocopied as clearly as Petitioner-Intervenors would like them to be. The enclosed copies contain no changes whatsoever to the text of the Application. Petitioner-Intervenors request that these copies be

submitted in a manner so as not to affect the jurisdiction of the Texas Supreme Court.

II.

Petitioner-Intervenors Alvarado Independent School District, et al., have notified all opposing counsel of record concerning this Motion. Opposing counsel of record have been informed that should they have difficulty reading Petitioner-Intervenors' Application, a new copy will be provided them upon request.

Respectfully submitted,

DAVID R. RICHARDS
State Bar No. 16846000
BANKS TARVER
State Bar No. 19656950
PHILIP DURST
State Bar No. 06287850

RICHARDS, WISEMAN & dURST
600 West 7th Street
Austin, Texas 78701
(512) 479-5017

RICHARD E. GRAY, III
Gray & Becker
323 Congress Avenue, Suite 300
Austin, Texas 78701
(512) 482-0061

CERTIFICATE OF SERVICE

I hereby certifty that a true and correct copy of the foregoing Motion of Petitioner-Intervenors Alvarado I.S.D., et al., has been sent on this 8th day of February, 1989, by United States Mail, postage prepaid to all counsel of record.

Banks Tarver

BANKS TARVER

C 8353

NO._____

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD I.S.D., et al.,

Petitioners,

V.

WILLIAM KIRBY, et al.,

Respondents.

PETITIONER EDGEWOOD'S MOTION TO ENLARGE
FIFTY PAGE LIMITATION FOR APPLICATION
FOR WRIT OF ERROR

Petitioners make this motion to enlarge the fifty (50) page limitation for application for writ of error, provided in Texas Rule of Appellate Procedure 131(i), to seventy (70) pages. In support of their motion, the petitioners respectfully show:

I.

This application for writ of error, to be submitted to the Court by February 3, 1989, arises from an adverse ruling in the Texas Court of Appeals for the Third Supreme Judicial District, entitled Kirby v. Edgewood, and numbered 3-87-190-CV.

II.

A timely Motion for Rehearing was denied on January 4, 1989.

III.

Enlargement of the page limitation provided in Appellate Rule 131(i) is necessary because of the factual and legal complexity of the case. For instance, there are more than 150 parties to the suit, most of them being independent school districts located in every area of the State.

Moreover, the trial on which the application for writ of error is based lasted for ten (10) weeks, and consisted of 32 witnesses and 431 exhibits. Additionally, the court heard lengthy arguments from counsel on the complex factual and legal issues presented in the case.

Also, a full understanding of the facts of case requires a comparative analysis of the property wealth per student, expenditures per student, tax rates, facilities and curriculum offered in several school districts across Texas.

Because of the complex nature of the case, and the voluminous record, an enlargement of the page limitations is necessary in order to present all issues clearly.

IV.

A copy of this motion to enlarge the application page limitations for petitioner's application for writ of error was filed with the clerk of the Court of Appeals for the Third Judicial District on the 24th day of January, 1989.

C-8353 SUPREME COURT OF TEXAS CASES 001
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. V. KIRBY, 1988-89
WILLIAM, ET AL. (3RD DISTRICT)

WHEREFORE, the Petitioner's request that this Honorable Court grant this motion and enter an order enlarging the fifty (50) page limit in this case to seventy (70) pages.

DATED: January 23, 1989

Respectfully submitted,

ANTONIA HERNANDEZ
E. RICHARD LARSON
NORMA V. CANTU
JOSE GARZA
JUDITH A. SANDERS-CASTRO
ALBERT H. KAUFFMAN
GUADALUPE T. LUNA
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Albert H. Kauffman
ALBERT H. KAUFFMAN
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259 S. Texas
Weslaco, TX 78596

ATTORNEYS FOR PETITIONERS
EDGEWOOD I.S.D., et al.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner Edgewood's Motion to Enlarge Fifty Page Limitation for Application for Writ of Error has been sent on this 23rd day of January 1989 by certified mail return receipt requested to all counsel of record.

Albert H. Kauffman

ALBERT H. KAUFFMAN

ATTORNEY FOR PETITIONERS

NO._____

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD I.S.D., et al.,

Petitioners,

V.

WILLIAM KIRBY, et al.,

Respondents.

O R D E R

On this _____ day of _____, 1989, the Texas Supreme Court heard Petitioners, Edgewood I.S.D., et al., motion to enlarge the fifty (50) page limitation for its application for writ of error to seventy (70) pages.

The motion is heretofore granted.

IT IS SO ORDERED.

JUSTICE OF TEXAS SUPREME COURT

C 8353

NO. C-8353

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners

V.

WILLIAM KIRBY, ET AL.,

Respondents

OPPOSITION TO APPLICATION FOR EXTENSION OF TIME

TO THE SUPREME COURT OF TEXAS:

COME NOW the Applicants for Writ of Error, Alvarado Independent School District, et al., a group of Plaintiff-Intervenors consisting of 55 school districts and a variety of individual plaintiffs, and oppose the request of the State of Texas and others for an extension of time in which to respond to our Application for Writ of Error. Our Application for Writ of Error was filed in the Court of Appeals on February 3, 1989 and served that date upon counsel for the Respondents, who presumably received it no later than February 6, 1989. Accordingly, Respondents under the current schedule would be afforded three weeks in which to respond to the Applications for Writ of Error, which is more than ample time. The issues in this case have been briefed exhaustively at the trial court and court of appeals and there is no

justification for an additional three week delay to respond to the Applications for Writ of Error.

II.

The alleged "extensiveness of the record" is no justification for an extension of time. The court of appeals did not tamper in any respect with the fact findings of the trial court and the size of the factual record can constitute no justification for delay. Under the circumstances, it would appear that the request for an extension of time is solely for the purposes of delay, not to serve the ends of justice and we respectfully urge a denial.

WHEREFORE, PREMISES CONSIDERED, Plaintiff-Intervenors, the Alvarado Independent School District, et al., urge the Court to reject the request of the Respondents for a delay in time to respond to our timely Application for Writ of Error.

Respectfully submitted,

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600 West 7th Street
Austin, Texas 78701
(512) 479-5017

DAVID R. RICHARDS
State Bar No. 16846000

RICHARD E. GRAY, III
Gray & Becker
323 Congress Avenue
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Austin, Texas 78701
(512) 482-0061

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Application for Extension of time has been sent on this 17 day of February, 1989, by United States Mail, postage prepaid to:

Earl Luna
Robert E. Luna
Mary Milford
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Power, Deatherage, Tharp & Blankenship
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John F. Boyle, Jr.
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Dallas, Texas 75201-4622

Jim Turner
Attorney at Law
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Kevin P. O'Hanlon
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

DAVID R. RICHARDS

APPLICATION FOR WRIT OF ERROR

FILED
SUPREME COURT
OF TEXAS

FEB 10 1989

MARY M. WAKEFIELD, Clerk

By _____ Deputy

C 6353

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners/Plaintiffs,

V.

WILLIAM KIRBY, et al.,

Respondents/Defendants,
Defendant-Intervenors.

APPLICATION OF PETITIONERS EDGEWOOD INDEPENDENT SCHOOL DISTRICT ET AL. FOR WRIT OF ERROR

ANTONIA HERNANDEZ
JOSE GARZA
NORMA V. CANTU
JUDITH A. SANDERS-CASTRO
ALBERT H. KAUFFMAN
GUADALUPE T. LUNA
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ATTORNEYS FOR PETITIONERS
EDGEWOOD ISD, ET AL.

FILED
FEB 03 89
THIRD COURT OF APPEALS
SUSAN K. BAGE, CLERK

NO._____

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners/Plaintiffs,

V.

WILLIAM KIRBY, et al.,

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Defendant-Intervenors.

APPLICATION OF PETITIONERS EDGEWOOD INDEPENDENT SCHOOL DISTRICT ET AL. FOR WRIT OF ERROR

ANTONIA HERNANDEZ
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ATTORNEYS FOR PETITIONERS
EDGEWOOD ISD, ET AL.

NO._____

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners/Plaintiffs,

V.

WILLIAM KIRBY, et al.,

Respondents/Defendants,
Defendant-Intervenors.

APPLICATION OF PETITIONERS EDGEWOOD INDEPENDENT SCHOOL DISTRICT ET AL. FOR WRIT OF ERROR

ANTONIA HERNANDEZ
JOSE GARZA
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EDGEWOOD ISD, ET AL.

NO.

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners/Plaintiffs,

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WILLIAM KIRBY, et al.,

Respondents/Defendants,
Defendant-Intervenors.

CERTIFICATE OF PARTIES

In order that members of the Court may determine disqualification or recusal pursuant to Texas Rule of Appellate Procedure 74(a), Petitioners certify that the following is a complete list of the parties and persons interested in the outcome of the case:

(1) William N. Kirby, State Commissioner of Education, Respondents
(2) Texas State Board of Education, Respondents
(3) Bill Clements, Governor and Chief Executive Officer of the State of Texas, Respondents
(4) Robert Bullock, State Comptroller of Public Accountants, Respondents
(5) State of Texas, Respondents
(6) Jim Mattox, Attorney General of Texas, Respondents
(7) Andrews Independent School District, Respondents
(8) Arlington Independent School District, Respondents
(9) Austwell Tivoli Independent School District, Respondents
(10) Beckville Independent School District, Respondents
(11) Carrollton-Farmers Branch Independent School District, Respondents

(12) Carthage Independent School District, Respondents
(13) Cleburne Independent School District, Respondents
(14) Coppell Independent School District, Respondents
(15) Crowley Independent School District, , Respondents
(16) DeSoto Independent School District, Respondents
(17) Duncanville Independent School District, Respondents
(18) Eagle Mountain-Saginaw Independent School District, Respondents
(19) Eanes Independent School District, Respondents
(20) Eustace Independent School District, Respondents
(21) Glasscock County Independent School District, Respondents
(22) Grady Independent School District, Respondents
(23) Grand Prairie Independent School District, Respondents
(24) Grapevine-Colleyville Independent School District, Respondents
(25) Hardin Jefferson Independent School District, Respondents
(26) Hawkins Independent School District, Respondents
(27) Highland Park Independent School District, Respondents
(28) Hurst Euless Bedford Independent School District, Respondents
(29) Iraan-Sheffield Independent School District, Respondents
(30) Irving Independent School District, Respondents
(31) Klondike Independent School District, Respondents
(32) Lago Vista Independent School District, Respondents
(33) Lake Travis Independent School District, Respondents
(34) Lancaster Independent School District, Respondents
(35) Longview Independent School District, Respondents
(36) Mansfield Independent School District, Respondents
(37) McMullen Independent School District, Respondents
(38) Miami Independent School District, Respondents
(39) Midway Independent School District, Respondents
(40) Mirando City Independent School District, Respondents
(41) Northwest Independent School District, Respondents
(42) Pine Tree Independent School District, Respondents
(43) Plano Independent School District, Respondents
(44) Prosper Independent School District, Respondents
(45) Quitman Independent School District, Respondents
(46) Rains Independent School District, Respondents
(47) Rankin Independent School District, Respondents
(48) Richardson Independent School District, Respondents
(49) Riviera Independent School District, Respondents
(50) Rockdale Independent School District, Respondents
(51) Sheldon Independent School District, Respondents
(52) Stanton Independent School District, Respondents
(53) Sunnyvale Independent School District, Respondents
(54) Willis Independent School District, Respondents
(55) Wink-Loving Independent School District, Respondents
(56) Edgewood Independent School District, Petitioners
(57) Socorro Independent School District, Petitioners
(58) Eagle Pass Independent School District, Petitioners
(59) Brownsville Independent School District, Petitioners

(60) San Elizario Independent School District, Petitioners
(61) South San Antonio Independent School District, Petitioners
(62) Pharr-San Juan-Alamo Independent School District, Petitioners
(63) Kenedy Independent School District, Petitioners
(64) La Vega Independent School District, Petitioners
(65) Milano Independent School District, Petitioners
(66) Harlandale Independent School District, Petitioners
(67) North Forest Independent School District, Petitioners
(68) Laredo Independent School District, Petitioners
(69) Aniceto Alonzo, on his own behalf and as next friend of his children Santos Alonzo, Hermelinda Alonzo, and Jesus Alonzo, Petitioners
(70) Shirley Anderson, on her own behalf and as next friend of her child Derrick Price, Petitioners
(71) Juanita Arredondo, on her behalf and as next friend of her children Agustin Arredondo, Jr., Nora Arredondo and Sylvia Arredondo, Petitioners
(72) Mary Cantu, on her own behalf and as next friend of her children Jose Cantu, Jesus Cantu and Tonitus Cantu, Petitioners
(73) Josefina Castillo, on her own behalf and as next friend of her child Maria Coreno, Petitioners
(74) Eva W. Delgado, on her own behalf and as next friend of her child Omar Delgado, Petitioners
(75) Ramona Diaz, on her own behalf and as next friend of her children Manuel Diaz and Norma Diaz, Petitioners
(76) Anita Gandara and Jose Gandara, Jr., on their own behalf and as next friends of their children Lorraine Gandara and Jose Gandara, III, Petitioners
(77) Nicolas Garcia, on his own behalf and as next friend of his children Nicolas Garcia, Jr., Rodolfo Garcia and Rolando Garcia, Graciel Garcia, Criselda Garcia and Rigoberto Garcia, Petitioners
(78) Raquel Garcia, on her own behalf and as next friend of her children Frank Garcia, Jr., Roberto Garcia, Roxanne Garcia and Rene Garcia, Petitioners
(79) Hermelinda C. Gonzalez, on her own behalf and as next friend of her children, Angelica Maria Gonzalez, Petitioners
(80) Ricardo Molina, on his own behalf and as next friend of his child Job Fernando Molina, Petitioners
(81) Opal Mayo, on her own behalf and as next friend of her children John Mayo, Scott Mayo and Rebecca Mayo, Petitioners
(82) Hilda Ortiz, on her own behalf and as next friend of her child Juan Gabriel Ortiz, Petitioners
(83) Rudy C. Ortiz, on his own behalf and as next friend of his children Michelle Ortiz, Eric Ortiz and Elizabeth Ortiz, Petitioners
(84) Estela Padilla and Carlos Padilla, on their own behalf and as next friends of their children Gabriel Padilla, Petitioners

(85) Adolfo Patino, on his own behalf and as next friend of his child Adolfo Patino, Jr., Petitioners
(86) Antonia Y. Pina, on his own behalf and as next friend of his children Antonio Pina, Jr., Alma Pina and Anna Pina, Petitioners
(87) Reymundo Perez, on his own behalf and as next friend of his children Ruben Perez, Reymundo Perez, Jr., Monica Perez, Raul Perez, Rogelio Perez and Ricardo Perez, Petitioners
(88) Patricia A. Priest, on her own behalf and as next friend of her children Alvin Priest, Stanley Priest, Carolyn Priest and Marsha Priest, Petitioners
(89) Demetrio Rodriguez, on his own behalf and as next friend of his children Patricia Rodriguez and James Rodriguez, Petitioners
(90) Lorenzo G. Solis, on his own behalf and as next friend of his children Javier Solis and Cynthia Solis, Petitioners
(91) Jose A. Villalon, on his own behalf and as next friend of his children, Ruben Villalon, Rene Villalon, Maria Christina Villalon and Jaime Villalon, Petitioners
(92) Alvarado Independent School District, Petitioners
(93) Blanket Independent School District, Petitioners
(94) Burleson Independent School District, Petitioners
(95) Canutillo Independent School District, Petitioners
(96) Chilton Independent School District, Petitioners
(97) Copperas Cove Independent School District, Petitioners
(98) Covington Independent School District, Petitioners
(99) Crawford Independent School District, Petitioners
(100) Crystal City Independent School District, Petitioners
(101) Early Independent School District, Petitioners
(102) Edcouch-Elsa Independent School District, Petitioners
(103) Evant Independent School District, Petitioners
(104) Fabens Independent School District, Petitioners
(105) Farwell Independent School District, Petitioners
(106) Godley Independent School District, Petitioners
(107) Goldthwaite Independent School District, Petitioners
(108) Grandview Independent School District, Petitioners
(109) Hico Independent School District, Petitioners
(110) Jim Hogg County Independent School District, Petitioners
(111) Hutto Independent School District, Petitioners
(112) Jarrell Independent School District, Petitioners
(113) Jonesboro Independent School District, Petitioners
(114) Karnes City Independent School District, Petitioners
(115) La Feria Independent School District, Petitioners
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(141) Star Independent School District, Petitioners
(142) Stockdale Independent School District, Petitioners
(143) Trenton Independent School District, Petitioners
(144) Venus Independent School District, Petitioners
(145) Weatherford Independent School District, Petitioners
(146) Ysleta Independent School District, Petitioners
(147) Connie DeMarse, on her own behalf and as next friend of her children Bill DeMarse and Chad DeMarse, Petitioners
(148) B. Halbert, on his own behalf and as next friend of his child, Elizabeth Halbert, Petitioners
(149) Libby Lancaster, on her own behalf and as next friend of her children, Clint Lancaster, Lyndsey Lancaster, and Britt Lancaster, Petitioners
(150) Judy Robinson, on her own behalf and as next friend of her child, Jena Cunningham, Petitioners
(151) Frances Rodriguez, on her own behalf and as next friend of her children Ricardo Rodriguez and Raul Rodriguez, Petitioners
(152) Alice Salas, on her own behalf and as next friend of her child, Aimee Salas, Petitioners

Albert H. Kauffman

ALBERT H. KAUFFMAN
ATTORNEY FOR PETITIONERS
EDGEWOOD, I.S.D. ET AL.

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IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners/Plaintiffs,

V.

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Defendant-Intervenors.

STATEMENT OF THE CASE

On June 1, 1987, Judge Harley Clark, 250th District Court, Travis County, issued a final judgment declaring the Texas School Financing System (Tex. Educ. Code §16.01, et seq., implemented in conjunction with local districts boundaries that contain unequal taxable property wealth for the financing of education) unconstitutional and unenforceable in law, and in violation of Art. I, §§ 3,3A, 19 & 29, and Art. VII, §1 of the Texas Constitution. The District Court also issued an injunction against state officials enjoining the school financing system and requiring a

constitutional plan to be enacted by September 1, 1989, and implemented by September 1, 1990. The District Court also entered detailed findings of fact and conclusions of law on August 27, 1987. The Defendant State Officials and Defendant-Intervenors School Districts appealed the judgment to the Third Supreme Judicial District in Austin, Texas. On December 14, 1988, the Third Supreme Judicial District reversed the District Court. Justices Shannon and Aboussie filed a majority opinion and Justice Gammage filed a dissenting opinion. The Court of Appeals held that education is not a fundamental right, wealth is not a suspect category, there is a rational basis for the school finance system, and that Article VII, §1 of the Texas Constitution is not violated by the Texas School Finance System because it is based on the definition of "efficient" which is "essentially a politically question not suitable for judicial review."

Both Plaintiffs and Plaintiff-Intervenors filed timely motions for rehearing which were denied by the Court of Appeals on January 4, 1989. This Application for Writ of Error follows.

JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction over this case pursuant to Texas Government Code Section 22.001, subsections (1), (2), (3) and (6), for the following reasons:

a. The justices of the Court of Appeals disagree on a question of law material to the decision;

b. One of the Courts of Appeals held differently from both a prior decision of another Court of Appeals and from the Texas Supreme Court on a question of law material to the decision of this case. Compare Kirby v. Edgewood I.S.D., slip op., cause no. 3-87-190-CV to Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985); Sullivan v. University Interscholastic League, 616 S.W. 2d 170 (Tex. 1981); Stout v. Grand Prairie I.S.D., 733 S.W.2d 290 (Tex.App.-Dallas 1987, writ ref.'d n.r.e.)

c. The case involves the construction and validity of Texas Education Code Sections 16.001, et seq., a state statute;

d. It appears that an error of law has been committed by the Court of Appeals, and the error is of such importance to the jurisprudence of the state that it requires correction.

STATEMENT OF FACTS

A. Introduction

The District Court found that under a constitutional system, "each student by and through his or her school district would have the same opportunity to educational funds as every other student in the state, limited only by discretion given local districts to set local tax rates. Equality of access to funds is

the key and is one of the requirements of this fundamental right." (TR. 538).

Plaintiffs produced evidence and the District Court found that the school finance system in Texas is inequitable as a whole and in its parts. This is true with regard to the system as a whole and in terms of wealth per pupil, expenditure per pupil, tax rates and the effect of the system on children in low wealth districts. The entire District Court Findings of Fact and Conclusions of Law are reproduced in the Petitioners' Appendix.

B. Variation in Wealth Per District and the Importance of This Variation

School districts in Texas have from $20,000 of property wealth per student[1] to $14,000,000 of property wealth per student, a ratio of approximately seven hundred to one. (TR.548). The 1,000,000 school children in the wealthy districts have two and a half times as much property wealth per student as do the 1,000,000 students in the bottom range of wealth. The 300,000 students in the highest property wealth school districts (10% of the total students) have 25% of the state's total property wealth to support their education; on the other hand, the 300,000 students in the lowest wealth districts have only 3% of the state property wealth. (TR.549). This difference is important because

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[1]Student in average daily attendance (ADA); state formulas and the analyses of all parties to the case dealt with ADA based on the best four weeks of eight weeks average attendance. For purpose of this brief "students" means "students in ADA."

of the amount of revenues that can be raised from the property base. The amount of revenue that can be raised in a school district is directly proportional to the amount of property wealth per student in the district. With a one cent tax rate, the richest district in the state can raise $1,400 of revenue per student and the poorest district can raise $2 per student. Highland Park School District in Dallas County can raise $100 per student for each $.01 tax rate and Wilmer-Hutchins District in the same county can raise less than $10 per student with a $.01 tax rate. There is a tremendous variation in ability to raise tax monies in districts in the state. (P.X. 104S, 106S, 108S, 110A, 114A). The state half-heartedly purports to deal with these varying abilities of school districts through its Foundation School Program. However, that program deals only with part of the revenues and the expenditures actually raised and spent in local school districts and does not nearly compensate for the wide variations in property wealth and the concomitant wide variations in ability to raise revenue for students within the districts. (Id.).

C. Difference in Expenditures Between Wealthy Districts and Poor Districts

The District Court found that "the amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student." (TR.548). Low wealth districts that are spending less are actually districts that need to spend more per student than do the high wealth

districts. For example, the 150,000 students (5% of total students in the state) in the wealthiest districts have more than twice as much spent on them as the 150,000 students at the lower end of school district wealth spectrum, and the 600,000 students (20% of total students) in the state in the high wealth districts have two-thirds more spent on their education than the 600,000 students in the low wealth districts. (TR.551).

The Court based findings upon the expenditures per student both in terms of the "raw numbers" and in terms of "weighted students." [2] (TR.551-52). Using the state's own formulas for the extra cost of educating children in programs such as Special Ed., Vocational Ed., Compensatory Ed., etc., and the extra cost of educating children in very large or very small districts, the Court found that the discrepancies in expenditures in the state are just as great or greater after allowing for the special needs of students in all districts, rich and poor. [3] (TR.551-52; P.X. 103S, 105A, 115A).

D. Variety of Tax Rates and Relation to Wealth

"The range of local tax rates in 1985-86 was from $.09 to

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[2]The weighted student concept acknowledges that some students, e.g. special education or vocational education students, are more expensive to educate than others.

[3]Plaintiffs included in their formulas even the extra cost of running educational programs in urban and sparsely populated rural areas, costs associated with the size and location of the school districts rather than the extra educational cost of the individual students themselves.

$1.55 per $100 evaluation." (TR.552). In other words, Texas has created and enforced a school finance system that allows tax payers in one district to buy more for $.09 than taxpayers in another district can buy for $1.55 per hundred dollar evaluation of property.[4] Again this variation is not only at the extremes. The Court considered the effect of these tax variations on the state as a whole and found that in general poor districts pay higher taxes than wealthy districts. (TR.553). The Court considered the variation in tax rates on large numbers of districts and students at the wealthy end of the spectrum and at the poor end of the spectrum. The Court found that hundreds of thousands of families live in districts and pay over $1.00 per $100 of property wealth and hundreds of thousands of families live in districts where they pay less than $.50 per $100 of property wealth. (TR.553). In terms of actual taxes paid on a $80,000 house after reductions for homestead exemption, the Court found a range of from $1,106.00 in Crystal City ISD, a very poor district, compared to $38.00 in Iraan-Sheffield, a very wealthy oil and tax haven district. (TR.554; P.X. 205).

Though the state will argue that the school finance system offsets this tremendous difference in wealth per pupil and ability to raise funds in districts, the District Court found that under the state's system, if every district in the state

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[4]The district with $.09 tax rate spent $13,429 per student in 1985-86 and the district with $1.55 tax rate spent $4,245 per student in 1985-86. (P.X. 215-16; 103c).

were making the average total tax effort, the students in the richest districts (5% of students) would still have twice as much spent on them as the students in the poorest districts (5% of students), and the students in the richer districts (600,000 of students) would have fifty percent more spent on them than do the 600,000 students in the poorest districts. (TR. 558-59).

"The average tax rate in the State's 100 poorest districts is 74.45 cents contrasted with 47.19 cents in the 100 wealthiest; in those same districts the average expenditure per pupil in the poorest districts was $2,978.00 as contrasted with $7,233.22 in the 100 wealthiest." (TR.555).

The Court looked at the system both at its extremes and at 20%, 40%, 60%, 80% and 100% of all the students in the state; under each comparison, students in the poor districts suffer compared to students in the wealthy districts. The Court looked at the system both under the present tax rates in the school districts and under a model in which all districts were assumed to have the same tax rate but with their present property wealth and the present school finance system (TR.557-58). Every comparison showed the comparative lack of resources available to students living in the low wealth districts.

E. Having Insufficient Funds Hurts Students Attending Low Wealth Districts

The Trial Court found that it really does deny opportunity to students when the districts that they attend do not have the ability to fund their educational programs. (TR.558-62). The

Court agreed with Dr. Kirby, the Texas Commissioner of Education, who stated that "as in so many things, in education, you get what you pay for" and "the quality of our education system is directly related to the amount of money spent on it." (TR.558). The increased financial support available to wealthy school districts allows them to "offer much broader and better educational experiences to their students," such as more extensive curriculum, training materials, libraries, staff specialists, teacher aides, counseling services, drop-out programs, parenting programs, smaller class sizes, and better teachers and administrators. (TR.559). The Court also found that many low wealth districts cannot afford to provide an adequate education for all their students and the system of public education in Texas does not provide an adequate education to students attending low wealth districts. (TR.560). Those findings were not reversed or even questioned by the Court of Appeals.

F. Low-Wealth Districts Have Inferior Facilities

The state does not even purport to pay for any of the cost of facilities. Instead they must be paid for completely from local districts funds with tremendously disparate ability between low wealth and high wealth districts to pay into these funds. (TR. 561-62). The Court found that "low wealth districts cannot afford to and do not provide as high a quality of facilities as do high wealth districts," and that "this has a negative effect on the educational opportunity of children in these districts." (TR.561-62). The cost of new facilities will skyrocket when the

new smaller class size requiremer. for grades 3 and 4 goes into effect in 1988-89.

G. Concentrations of Low Income Students in Low Wealth Districts

There is a great concentration of low income students and low income families in the low wealth districts. (TR.562-65). This places an increased burden on low wealth districts to provide a more comprehensive educational program, rather than the less comprehensive program they are able to offer under the present school finance system. (TR.562-63). For example, although 36% of all students in Texas schools are low income, 85% of the students in the lowest wealth districts (5% of students) are low income and 60% of the students in the low wealth districts (25% percent of students) are low income. (TR.536; P.X.48 in appendix). There is a concentration of below-poverty families in the lowest wealth districts. The median family income in the lowest wealth districts in 1980 was $11,590 compared to the state median family income of $19,760. (P.X. 48). Eighty-five percent of students in the lowest wealth districts are below the federal poverty standard, the recognized standard of poverty.

H. The Negative Effect of School Finance System on Particular Texas School Districts

Five low wealth school district superintendents and residents of three school districts testified on the effect of the entire system of school finance on their individual districts

and on the students within their districts.

1. The San Elizario district has approximately 1000 students in rural El Paso County. San Elizario, in 1985-86, had a tax rate of $1.07 per hundred dollars evaluation (compared to the average in the state of $.66). (TR.549). San Elizario "cannot provide a fully adequate curriculum for its students;" it offers no foreign language, no pre-kindergarten program, no college preparatory program and has virtually no extra-curricular activities. (TR.560). The San Elizario District has had tax rates of $1.96 (1984), $1.90 (1985) and $1.29 (1987) in other recent years. (S.F. 3391). The district cannot meet the class size requirements of state law. It can provide only a "general diploma" and not the "advanced" or "advanced with honor" diplomas necessary for college. (S.F. 3403). San Elizario has 96% low income students compared to 36% for the state as a whole. (TR.563).

Over one-third of the teachers in the San Elizario District are not certified to teach the areas in which they are teaching (S.F. 3399). In addition to being unable to offer foreign languages, the school district offers no chemistry, physics, calculus, honors courses, and only offers geometry and algebra II in alternate years. (S.F. 3400). The district cannot afford and does not offer band, football teams, choir or debate. (S.F. 3404-05). The district has no library at the middle school. In 1985 the roof caved in at the high school because the district could not afford to repair it. (S.F. 3409-10). The district teaches kindergarten in a fifty-year-old adobe house. (S.F.

3410). The San Elizario district has to spend money to build its own sewage and water systems because the district is not in any city sewage and water systems; this will cost the district $250,000 in a district that can only raise a total of $2,700 for each penny tax rate. (S.F. 3411-12).

The superintendent of the San Elizario district, based on his many years of experience in the district and previous experience in other school districts and the armed forces, concluded that "children going to school in the [San Elizario] district are not given an equal opportunity to obtain the benefits of an education under the circumstances existing in the district today." (S.F. 3415). He also concluded that the district does not have "an opportunity to give an equal education or an adequate education to the kids in the district." (S.F. 3417). The San Elizario district has sought to consolidate with surrounding districts but the surrounding districts have not wanted to consolidate with San Elizario; and the superintendent of San Elizario could understand why other districts would not want to add on the burden of San Elizario's low tax base and high number of "high cost students." (S.F. 3416). The San Elizario District has at all times been accredited by the Texas Education Agency. (S.F. 3396).

2. The superintendent of the North Forest ISD in Harris County described the effects of the Texas School Finance System on a large urban low wealth district. The Court found that "North Forest, a black (ninety percent) district in Harris County has $67,630 of property value per student while the adjoining

Houston I.S.D. has $348,180." (TR. 549). North Forest had a tax rate of $1.05 and cannot "provide a full range of educational offerings to their students." (TR.557). "North Forest ISD in Harris County had the highest failure rate in Texas on the TECAT exam [an exam of basic skills for working teachers in the district], but is unable to compete with its wealthier neighbors for teachers because it cannot match their salary offerings." (TR.560). The North Forest District has raised its tax rate in 1986-1987 from $1.07 to $1.17. (S.F. 2588). The tax rates in North Forest have been consistently over twice the state average tax rates; [5] yet the district pays a basic teacher salary of $4,500 less than adjoining districts. (S.F. 2590-2599). The district has suffered significant problems in facilities, hiring quality teachers, recruiting staff, and if the district were "adequately funded" the district could resolve these problems. (S.F. 2599, 2600). With regard to hiring teachers, the superintendent of North Forest stated "so, money does make a difference. It forces the North Forest-type districts in many cases to settle for an alternative after another district has made its selection." (S.F. 2601). Despite the high tax rate in the North Forest District, the district still spent several hundred dollars less per student than the state average. [6] (S.F.

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[5] 1978-$1.80, 1979-$1.80, 1980-$1.75, 1981-$1.75, 1982-$1.26, 1983-$1.36, 1984-$1.11, 1985-$1.12, 1986-$1.12, 1987-$1.17.

[6] $500 a student in average daily attendance is approximately $11,000 a classroom.

2602). The fact that the North Forest district has such a high tax rate is a concern to the business community and a negative factor discouraging businesses from putting their facilities in the district. [7] (S.F. 2611-12). The inability to pay as high salaries as surrounding school districts hurts the quality of the teaching force in the North Forest district, both in terms of attracting and keeping school teachers. (S.F. 2611-12, 2620). The district will be forced to build many new buildings in the future and is already tied in to a high tax rate. (S.F. 2625). Thirteen of the sixteen campuses in the district need substantial improvements. (S.F. 2626). The condition and maintenance of facilities have a significant effect on the learning environment in the school district. (S.F. 2628). The children in the North Forest district do not have "an equal opportunity to learn or progress in our society to the opportunity of kids in other wealthy districts." (S.F. 2634). In North Forest the opportunity "is not equal. It is not equal at all." (S.F. 2634). Mr. Sawyer, the superintendent of North Forest, described the much more difficult time poor districts have in trying to meet new state mandates with the low wealth districts' insignificant tax bases. (S.F. 2663-64). In North Forest, the funding is still "inadequate in relationship to the high cost of education and the competition that we face in the county area." (S.F. 2715). Texas

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[7] This is consistent with the Court's findings of the cycle of poverty into which low wealth districts are trapped. (TR.575).

is "funding in a level substantially below what experts know the basic educational program costs." (S.F. 2725). The North Forest I.S.D. has at all times been accredited.

3. Both a parent and the superintendent of Socorro ISD in El Paso County testified before the Court. The Court found that "Socorro ISD in El Paso County because of its high growth rate and inadequate facilities has been forced to build new buildings and the district now is unable to make payment on principal and faces potential bankruptcy." (TR. 560). The Socorro district is growing very rapidly at a rate of 12% to 15% increase in average daily attendance per year. (S.F. 763). Most of the growth in the Socorro ISD is recent arrivals from Mexico. These recent arrivals live in "colonias" (S.F. 766). These "colonias" have no water, electricity, fire protection, police protection or good roads. (S.F. 766). Seventy percent of the district's students come from poverty-level families. (S.F. 768). This causes the district to have very high costs for its students. (S.F. 768-69). Mr. Sybert, the superintendent of the Socorro ISD and an educator for thirty-five years, testified that "I can't say that the total measure of success in our school district is based on the TEAMS test that certainly is not it." (S.F. 773).

The tax rate for bonds in Socorro is $.50 compared to $.11 for the state as a whole. (S.F. 782). The Socorro district has refinanced its bonds and presently is paying interest only on the bonds and not principal. At the same time the district is having to build two new buildings every year to keep up with the growth. The district is heading for "imminent financial collapse." (S.F.

783). The Socorro district has been on waivers, i.e. has not been able to meet state requirements on class size. (S.F. 787).

The district has high school English teachers that have 175 students a day. (S.F. 789). These large classes have a negative effect on the education of the students. (S.F. 790). The superintendent of Socorro described the need for very small classes such as one teacher to every twelve or fifteen students in the poorest areas of the school district. (S.F. 794). Unfortunately he cannot afford to do that. (Id.). The district has one counselor for 7,000 students in grades K-8 and the district has only had this counselor for two years. (S.F. 796). The Socorro district, with all of its low income and limited English speaking children, cannot afford to offer a full- day kindergarten but only a half-day kindergarten. (S.F. 805).

The built-in problems of lack of funds and the cycle of poverty were expressed by the Socorro superintendent. He testified that the district obtains its school buses from a state agency that has bought the buses from other school districts which can no longer run the buses economically; in other words because of lack of "upfront money" Socorro buys old buses which are more expensive to operate in the long run. (S.F. 808). Because there is no running water or sewage lines to a new school building being built in Socorro, the district undergoes much greater expense to obtain water from other sources and to set up its own sewage treatment processes. (S.F. 811). The school district only sends ten percent of its students to college. (S.F. 811). A recent study showed that none of the graduating students

from Socorro graduated from college in a four year period. (S.F. 811). The district cannot afford the college preparatory courses that it needs because it cannot afford small classes, (S.F. 813-814) The Socorro district cannot meet TEA laboratory or library standards. (S.F. 824). For the first two years of H.B. 72, the Socorro district could not even afford to have a pre-kindergarten program because of lack of classroom space and lack of funds to build new classes. (S.F. 834) This had a negative effect on the educational opportunities of the children. (S.F. 834). Socorro district has a large number of teachers who are not certified to teach the courses they are teaching and this could be rectified with additional funding. (S.F. 836).

The superintendent of Socorro concluded that, based upon his thirty-five years of educational experience with TEA requirements, the district cannot afford the basic educational requirements of the youngsters they have in their school. (S.F. 838), and the problem has "everything to do with money it sure does." (S.F. 839). The Socorro superintendent said:

> I need to buy quality teachers in a competitive market, I need to buy things for youngsters to use like library books and science laboratories, I need to buy extended time like summer programs and after school tutorials. All of the things and all of the services that I want to provide for my kids cost money.

(S.F. 839). According to the state's own statistics, the pupil-teacher ratio in Socorro is 21.9 to 1 compared the state average of 17.5 to 1 and the professional salary per pupil in Socorro district is $1,200 compared to $1,700 for the state. (S.F. 914; P.X. 190). Because Socorro has such a high tax rate to pay off

bonds, it is forced to have a lower maintenance and operations tax to pay for normal school expenses. (S.F. 928). The Socorro district has at all times been accredited.

I. The School Finance System in Inadequate and Provides An Inadequate Education to Students In Low Wealth Districts

The District Court made extensive findings on the inadequacy of the Texas School Finance System for low wealth districts and students attending those districts. (TR.558-60). The Court also summarized some of the state "requirements" that low wealth districts cannot meet, (TR.560-61), and the historical inadequacy of the system. (TR.565-66). The Court also gave a detailed explanation of the weaknesses of the Foundation School Program formulas, (TR.565-69), especially the inadequacy of the basic allotment and the remaining parts of the formula which are based on the basic allotment. (TR.565-67; 571-75). Dr. William Kirby, Texas Commissioner of Education, and Dr. Walker, business official for the Ector County I.S.D. have stated and affirmed that the present school finance system is neither equitable nor adequate. (P.X. 235, p.65). Dr. Kirby and Dr. Walker also stated that "the adequacy of state support of the Texas Foundation Program is still questionable, despite increases in state aid under H.B. 72, and the provisions for 1985, 1986, 1987, are inadequate and will require legislative review and action in the 1987 session." (P.X. 235, p.65).

Dr. Jose Cardenas, former superintendent of the Edgewood I.S.D., a nationally known educational expert (P.X. 94) and

founder and Director of Intercultural Development Research Association (which prepared the recent state dropout study), testified that the inequities in school finance have led to a denial of equal educational opportunity to children living in low wealth school districts in the State of Texas. Dr. Cardenas also testified that higher wealth districts have more experienced and better trained teachers, more teachers who are highly paid and with advanced degrees, and better administrators than do low wealth districts; (S.F. 3463-64); that high wealth districts have better quality facilities; (S.F. 3464); and that factors such as "teacher quality, teacher numbers, administrative support quality, facility quality, do have an effect on the education than can be offered to children in school districts;" (S.F. 3465); he testified about the extra cost and extra programs necessary for low income children and the concentration of these children in low wealth districts. (S.F. 3465-66). Dr. Cardenas testified that "the higher the wealth of the school district, the lower the dropout rate." (S.F. 3486).

Dr. Cardenas concluded that the effect of the Texas School Finance System on children attending school in low wealth districts has been:

> diminished performance in terms of achievement, I think that increased dropouts, I think that there is subsequent lesser enrollment in college and pursuing academic studies, I think it is handicapping in terms of employment and certainly handicapping in terms of quality of life, and I think it has a detrimental effect upon those children in subsequent years throughout their whole life.

(S.F. 3484).

Dr. Richard Hooker has participated in the development of school finance legislation in Texas for twenty years, was a member of the state appointed accountable cost committee, and was involved in the drafting of H.B. 72 finance provisions. He testified about the inadequacy of the school finance system as related to the education available in low wealth districts. Dr. Hooker testified that children in low wealth districts do not have access to substantially equal programs and services in education in the state and that this is caused by the lack of equity in the state Foundation School Program and the existence of widely varying local tax bases. (S.F. 148). Dr. Hooker described the great difficulty the property poor school districts have in providing a quality education. (S.F. 181-82).

Dr. Hooker also testified to the inadequacy of the "basic allotment," Tex. Educ. Code § 16.101. The state adopted a $1290 basic allotment for 1984-85 and a $1350 basic allotment for subsequent years. The state-appointed committee (and Senate Bill 1, in 1984 special session) recommended a basic allotment of $1842 for the 1984-1985 year and a higher basic allotment for subsequent years. (S.F. 220, 518). Dr. Hooker stated that the basic allotment should be $2600 (compared to the actual $1350) in 1987-88, (S.F. 518), and $2800 (compared to the $1350 in present legislation) in the 1988-89 school years in order to have an "adequate system." (S.F. 419).

Dr. Hooker described the effect of the low basic allotment on the other parts of the school finance formula that depend on that basic allotment. As the Court found, the fact that the

basic allotment is too low ($1,350 compared to $2,000 necessary in 85-86, and $2,600 necessary in 87-88) is exacerbated by the fact that the "add-ons" in the school finance formulas are based directly on the basic allotment. (S.F. 1440). These tie-ins were noted by the District Court. (TR. 570-72).

PETITIONERS EDGEWOOD, ISD ET AL., POINTS OF ERROR

POINT OF ERROR NO. 1

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTEE OF EQUAL RIGHTS. (Point No. 1 in Court of Appeals) (slip op., pp. 1,9,13)

POINT OF ERROR NO. 2

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT ENTITLEMENT TO EQUAL EDUCATIONAL OPPORTUNITY IS NOT A FUNDAMENTAL RIGHT UNDER THE TEXAS CONSTITUTION. (Point No. 2 in Court of Appeals) (slip op., pp.1,7,8)

POINT OF ERROR NO. 3

THE HONORABLE COURT OF APPEALS ERRED IN MISAPPLYING RULES OF CONSTITUTIONAL CONSTRUCTION IN DETERMINING THAT EQUAL EDUCATIONAL OPPORTUNITY IN THE PUBLIC SCHOOLS IS NOT A FUNDAMENTAL RIGHT UNDER THE TEXAS CONSTITUTION. (Point No. 3 in Court of Appeals) (slip op., 1,7,8)

POINT OF ERROR NO. 4

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT WEALTH IS NOT A SUSPECT CLASSIFICATION IN THE SCHOOL FINANCE CONTEXT. (Point No. 4 in Court of Appeals) (slip op., pp.1,8)

POINT OF ERROR NO. 5

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT, IN THE SCHOOL FINANCE CONTEXT, WEALTH IS NOT A SUSPECT CATEGORY, BECAUSE IT FAILED TO CONSIDER THE UNDISPUTED FACTUAL FINDINGS OF THE DISTRICT COURT. (Point No. 5 in Court of

Appeals) (slip op., pp.1,8)

POINT OF ERROR NO. 6

THE HONORABLE COURT OF APPEALS ERRED IN NOT HOLDING THAT EQUAL EDUCATIONAL OPPORTUNITY MAY NOT BE DENIED BY A SCHOOL FINANCE SYSTEM UNLESS IT IS JUSTIFIED BY A SHOWING THAT THE SYSTEM FURTHERS SOME SUBSTANTIAL STATE INTEREST. (Point No.6 in Court of Appeals) (slip op. pp. 1,9,13)

POINT OF ERROR NO. 7

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION SATISFIES RATIONAL BASIS ANALYSIS. (Point No. 7 in Court of Appeals) (slip op. pp. 1,13)

POINT OF ERROR NO. 8

THE HONORABLE COURT OF APPEALS ERRED IN APPLYING AN ERRONEOUS TEST OF RATIONAL BASIS ANALYSIS UNDER THE TEXAS CONSTITUTION. (Point No. 8 in Court of Appeals) (slip op. pp. 1,3,8,9,13)

POINT OF ERROR NO. 9

THE HONORABLE COURT OF APPEALS ERRED IN FAILING TO DEFER TO THE TRIAL COURT'S FINDING THAT THE CLAIM OF LOCAL CONTROL WAS FACTUALLY INSUFFICIENT TO JUSTIFY THE DISCRIMINATION IN THE TEXAS SCHOOL FINANCE SYSTEM. (Point No. 9 in Court of Appeals) (slip op. pp. 1,9,13)

POINT OF ERROR NO. 10

THE HONORABLE COURT OF APPEALS ERRED TO THE EXTENT THAT IT HELD THAT ARTICLE VII, SECTION 3 OF THE TEXAS CONSTITUTION LEGITIMATES OR AUTHORIZES THE EXISTING TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION. (Point No. 10 in Court of Appeals) (slip op. pp. 1,9,13)

POINT OF ERROR NO. 11

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION MEETS THE CONSTITUTIONAL GUARANTEE THAT IT BE EFFICIENT. (Point No. 11 in Court of Appeals) (slip op. pp. 1, 13)

POINT OF ERROR NO. 12

THE HONORABLE COURT OF APPEALS ERRED IN FAILING TO DETERMINE WHETHER THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION MEETS

THE MANDATORY DUTY IMPOSED UPON THE LEGISLATURE BY THE TEXAS CONSTITUTION TO MAKE SUITABLE PROVISIONS FOR THE SUPPORT AND MAINTENANCE OF AN EFFICIENT PUBLIC SCHOOL SYSTEM. (Point No. 12 in Court of Appeals) (slip op. pp. 1-15)

POINT OF ERROR NO. 13

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT ART. VII § 3 OF THE TEXAS CONSTITUTION ALLOWS THE STATE TO MEET ITS DUTY TO ESTABLISH AND MAKE SUITABLE PROVISIONS FOR THE SUPPORT AND MAINTENANCE OF AN EFFICIENT SYSTEM OF PUBLIC FREE SCHOOLS THROUGH THE USE OF AN INEFFICIENT, IRRATIONAL SCHOOL FINANCE SYSTEM THAT NEGATIVELY IMPACTS ON CHILDREN IN LOW-WEALTH SCHOOL DISTRICTS. (Point No. 13 in Court of Appeals) (slip op. pp. 1,9,13)

POINT OF ERROR NO. 14

THE HONORABLE COURT OF APPEALS ERRED IN THAT IT VIOLATED DOCTRINES OF CONSTITUTIONAL CONSTRUCTION AND SEPARATION OF POWERS BY HOLDING THAT THE EFFICIENCY CLAUSE OF ART. VII § I OF THE TEXAS CONSTITUTION IS NOT AMENABLE TO JUDICIAL REVIEW. (Point No. 14 in Court of Appeals) (slip op. pp. 13)

POINT OF ERROR NO. 15

THE HONORABLE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE DUE COURSE OF LAW PROVISION OF THE TEXAS CONSTITUTION. (Point No. 15 in Court of Appeals) (slip op. pp. 1,15)

POINT OF ERROR NO. 16

THE HONORABLE COURT OF APPEALS ERRED IN THAT IT VIOLATED PROPER TEXAS STANDARDS OF CONSTITUTIONAL INTERPRETATION IN ITS INTERPRETATION OF ART. VII §1 AND ITS FAILURE TO HARMONIZE ART. I §3, ART. I §19, ART. VII §1 AND ART. VII §3 OF THE TEXAS CONSTITUTION. (Point No.16 in Court of Appeals) (slip op. pp. 1-15)

POINT OF ERROR NO. 17

THE HONORABLE COURT OF APPEALS ERRED IN OVERRULING PLAINTIFFS-APPELLEES CROSS POINT OF ERROR NO. 1, WHICH READ:

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE DEFENDANTS ARE IMMUNE FROM LIABILITY FOR ATTORNEYS FEES." (Point No.17 in Court of Appeals) (TR.606-07)

POINT OF ERROR NO. 18

THE HONORABLE COURT OF APPEALS ERRED IN OVERRULING PLAINTIFFS-APPELLEES CROSS POINT OF ERROR NO. 2 WHICH READ:

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT ENTERING JUDGMENT FOR PLAINTIFFS AND PLAINTIFF-INTERVENORS AGAINST STATE DEFENDANTS FOR ATTORNEYS FEES AND COSTS IN THE AMOUNTS FOUND BY THE TRIAL COURT TO BE REASONABLE AND NECESSARY."
(Point No. 18 in Court of Appeals) (TR.606-07)

POINT OF ERROR NO. 19

THE HONORABLE COURT OF APPEALS ERRED IN OVERRULING PLAINTIFFS-APPELLEES CROSS POINT OF ERROR NO. 3 WHICH READ:

"THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING ATTORNEYS FEES AGAINST DEFENDANT INTERVENOR SCHOOL DISTRICTS AND ERRED AS A MATTER OF LAW BY NOT RENDERING JUDGMENT FOR FEES AND COSTS AGAINST DEFENDANT INTERVENOR SCHOOL DISTRICTS
(Point No. 19 in Court of Appeals) (TR.606-07)

POINT OF ERROR NO. 20

THE HONORABLE COURT OF APPEALS ERRED IN ADJUDGING COSTS AGAINST APPELLEES. (Point No. 20 in Court of Appeals)

SUMMARY OF ARGUMENT

The system that the Texas Legislature has designed, implemented and maintained for financing the public schools in the state is unconstitutional under the requirements of the Texas Constitution. The Legislature has designed and maintained a structure of school districts with widely varying property tax bases with concomitant differences in ability to provide an education for their children. The Legislature has implemented a system of funding which exacerbates the existing differences among property wealth bases in these districts. The Legislature has designed a system of supplementing school finance expenditures which does not sufficiently account for the property

wealth differences in the state, and the Legislature continues and supports the discrimination caused by the school district structure and the tax structure. The confluence of these acts and failures to act by the Texas Legislature has caused a denial of equal educational opportunity to the children who attend school districts of low property tax wealth per student.

Under the standards of both the Texas Supreme Court and other state supreme courts which have considered issues of state school finance, the Texas School Finance System denies equal protection rights and fails to meet the standards of the Texas Constitution requiring the Legislature to provide for an "efficient" system of public schools in the state. The Texas School Finance System has a special negative effect on low income students who reside in low wealth districts.

The District Court's judgment was tailored to require the Legislature to meet the standards of the Constitution, without having court interference in the details of school financing structure and administration. The judgment merely requires adherence to the Texas Constitution. The Court was within its jurisdictional bounds in requiring conformance by the state to the mandates of the Texas Constitution.

The Trial Court improperly denied attorneys fees and costs to Plaintiffs, but that decision has been subsequently overruled in the T.S.E.U. case. This Court should render judgment to Plaintiffs for attorneys' fees and costs.

Standard of Review

Although Defendant-Appellants lodged some limited attacks on the District Court's fact findings none of the District Court's fact findings were reversed on appeal. Indeed, the Court of Appeals quoted the fact findings with apparent approval. Even if the Court of Appeals may be argued to have sub silentio reversed any fact findings, the fact findings must stand. Cain v. Bain, 709 S.W.2d 175 (Tex.1986); Garza v. Alviar, 395 S.W.2d 821 (Tex.1965). The facts as found by the District Court are the facts of the case.

Furthermore, the District Court's determination of the nature of the "local control" justification and the interests of school children are the facts of this case since:

> [F]actual determinations as to the nature of the state's objective and reasonableness of the means used to achieve it are properly made by the trial court.

Tex. State Employees Union v. Tex. Dept. of MHMR, 746 S.W.2d 203, (Tex.1987).

I. THE TEXAS SCHOOL FINANCE SYSTEM DENIES PLAINTIFFS EQUAL RIGHTS AND ENTITLES A SET OF PERSONS TO EXCLUSIVE SEPARATE PUBLIC PRIVILEGES (Points of Error 1,2,3,4,5,6,7,8,9,10)

A. SUMMARY OF EQUAL RIGHTS ARGUMENT

This case is brought under the Texas Equal Rights Provision, TEX. CONST. Art. I §3. This Court has interpreted the Texas Equal Rights Provision as being broader than the United States Equal Protection Clause considered in San Antonio Independent

School District vs. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973). The U. S. Supreme Court decisions on equal protection provide a floor of protection beneath which this Court cannot go; however, this Court has interpreted and should interpret the Texas Constitution in light of Texas Constitutional language and policy.

Each individual student in Texas is entitled to an equal educational opportunity, and this opportunity is a fundamental right under the Texas Constitution. The state system of school finance classifies persons into groups of residents of school districts of varying wealth, and their access to equal educational opportunity is controlled by that classification. The residents of low wealth school districts fit all the definitions of a suspect classification. Because equal educational opportunity is a fundamental right and a suspect class is negatively impacted by the Texas School Finance System, this Court must review the system under the strict scrutiny standard. Under this standard the State is required to show, but has not shown, that there is a compelling state interest in the school finance system and that it cannot be met by less restrictive, less onerous means.

Plaintiffs stand firm behind the District Court's Judgment that equal educational opportunity is a fundamental right in Texas. However, should this Court not so hold, this Court should still apply heightened scrutiny, even above the rational basis test, to a system with such clear negative effects on educational opportunity.

There is no rational basis for the present school finance system, and the interests that have been presented to justify the system are either not served by the Texas School Finance System or have not been shown to be rationally related to the present school finance structure. The District Court's undisputed fact findings must be given deference in this analysis.

B. CHILDREN IN TEXAS HAVE A FUNDAMENTAL RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY WITHOUT REGARD TO THE WEALTH OF THE DISTRICTS IN WHICH THEY RESIDE

1. Introduction

An analysis of holdings of the Texas Supreme Court, other state supreme courts, the United States Supreme Court, and the language and structure of the Texas Constitution lead to the conclusion that, in Texas, equal educational opportunity is a fundamental right in the context of a challenge to the total system of finance of public schools in the state. In Stout v. Grand Prairie I.S.D., 733 S.W.2d 290, 294 (Tex. App.-Dallas 1987, writ ref'd. n.r.e.), the Court held that·

> Public education is a fundamental right guaranteed by the Texas Constitution. TEX. CONST. ART. VII.

Petitioners agree. The Third Court of Appeals does not.

2. The Court of Appeals Did Not Follow Texas Supreme Court Precedent In Determining Whether Equal Educational Opportunity is a Fundamental Right

The Court of Appeals erred when it relied on its previous decision in Hernandez v. Houston I.S.D., 558 S.W.2d 121 (Tex. Civ. App.-Austin 1977, writ ref'd n.r.e.) to determine whether education is a fundamental right and to define the proper test to be applied in "rational basis" cases.

When reviewing exactly the same statute in question in Hernandez, the U. S. Supreme Court in Plyler v. Doe, 457 U. S. 202, 102 S.Ct. 2382 (1982) reviewed the statute under heightened scrutiny and found the statute unconstitutional under the U. S. Constitution. Because the interpretation of the federal Equal Protection Clause is the base for Equal Protection analysis under the Texas Equal Protection Clause, Whitworth, the Hernandez Court is wrong.

The Hernandez case was relied on by the Third Court of Appeals in Sullivan v. University Interscholastic League, 599 S.W.2d 860 (Tex.App.-Austin 1980, reversed). The Sullivan court upheld the University Interscholastic League no-transfer rule in spite of an Equal Protection challenge. This Court reversed the Third Court of Appeals (and, we argue, the Hernandez test) in Sullivan v. University Interscholastic League, 616 S.W.2d 170 (Tex. 1981).

Application of an incorrect rational-basis test led the Court of Appeals to real error. Upholding state classifications unless they "rest upon grounds wholly irrelevant" (Edgewood slip opinion at 3 and 13), is in effect carte blanche approval of state classifications and is inconsistent with this Court's holdings in Sullivan, Stamos, and Whitworth.

The Texas Equal Protection Clause is both effectively and textually broader that the United States Equal Protection Clause.

The Texas Equal Protection Clause includes both an affirmative clause ("all free men have equal rights") and a negative prohibition ("no man or set of men, is entitled to

exclusive public emoluments, or privileges"). The Texas Equal Protection Clause was enacted thirty years before the U. S. Equal Protection Clause.

In reaching its conclusion that education is a fundamental interest in Texas the Trial Court did not consider itself bound by the decisions of the U. S. Supreme Court, noting instead that Texas courts are "free to accept or reject federal holdings" in formulating a body of law under the state's own Constitution. Whitworth, 699 S.W.2d at 196. The Trial Court undertook precisely the kind of role left open to the Texas courts by Rodriguez. It examined the specific language and history pertaining to education in Texas constitutional law, heard the testimony of the witnesses concerning the essential nature of education in the life of the state and the liberties of its citizens, and considered the reasons put forth by the state and wealthy districts in justification for the factual conditions of inequality which appeared in the record. The Trial Court's ruling was based upon all three tests used in the U. S. Supreme Court cases: the system failed under a (1) strict scrutiny test, since education was found to be fundamental; it failed as well under the (2) substantial interest and (3) rational relationship tests, since the local control assertions of the Defendants were found to be insubstantial and not rationally related to legitimate state interests.

Far from mechanistically applying the Rodriguez "explicit or implicit" test, the Trial Court undertook just the kind of necessary and responsible analysis of the State Constitution in

light of local facts and circumstances which other courts have followed in similar cases.

The Court of Appeals objects to the Trial Court's finding of a fundamental interest in education because of the many interests covered in the Texas Constitution, not all of which can be fundamental.

The Trial Court's conclusion that education is fundamental rested on its undeniable finding that: "it is apparent that as a factual matter education is fundamental to the welfare of the State and is a guardian of other important rights." (TR.538). It is not the commonality of constitutional reference which is remarkable but rather the unique, fundamental and essential nature of education which distinguishes it from each and every one of the other provisions the Court of Appeals cites.

Other state courts have understood the obvious difference. "Education is fundamental," stated the California Supreme Court, because of its impact "on those individual rights and liberties which lie at the core of our free and representative form of government." Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976). This is because "the right to equal educational opportunity is basic to our society... the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights." Dupree v. Alma School District No. 30, 651 S.W.2d 90, 93 (Ark. 1983). A Montana court finding that state's school finance system unconstitutional, held that education, "is most assuredly a right without which other constitutionality guaranteed rights would have little meaning."

Helena Elementary School Dist. No. 1 v. State of Montana, No. ADV-85-370, (Montana 1st Jud. Dist., Lewis and Clark County, January 13, 1988). In sum, education, "is the very essence and foundation of a civilized culture, it is the cohesive element that binds the fabric of our society together." Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) (Bogdanski, J. concurring).

Unlike any other state-run social program which the Court of Appeals might enumerate, only in the area of education does the state actually compel attendance of the young in the public schools for nearly the entire span of childhood. The state in effect, compels residents of all but wealthy districts to pay local taxes to support their schools. These and similar distinguishing features of the educational system are enumerated by the Trial Court.

3. The Honorable Court of Appeals Miconstrued Federal Case Law and Ignored Relevant Decisions Of Other State Supreme Courts

The Trial Court's conclusion that education is a fundamental interest under the Texas Constitution was buttressed, in part, by its reading of the United States Supreme Court's opinions in Rodriguez and Plyler. The District Court was faithful to the test set forth in Rodriguez (and re-iterated in Plyler) for determining a fundamental interest; and furthermore, the Court was well within the bounds set forth in Plyler for exercising a mid-level of scrutiny of the proffered excuses for Texas' "chaotic and unjust" scheme of school finance.

In Rodriguez, the Supreme Court was called upon to address the disparities in funds available to Texas school districts under the Equal Protection Clause of the U. S. Constitution. The Rodriguez analysis turned upon the question of whether education was a "fundamental interest" under the Federal Constitution. If it was, then strict scrutiny would be applied; if not, a rational relationship test would be used. The majority felt that "the key to discovering whether education is fundamental [is] whether there is a right to education explicitly or implicitly guaranteed by the Constitution." The Rodriguez Court concluded: "Education is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."

The Texas Constitution, unlike the Federal Constitution, contains an explicit Education Article setting forth the essential nature of education in Texas and the Legislature's mandatory duty to establish suitable provision for its support and maintenance. Tex. Const. Ann. art. VII §1. Citing similar explicit references in its own Constitution, the Wyoming Supreme Court, in a post-Rodriguez case, concluded: "In light of the emphasis which the Wyoming Constitution places on education there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest." Washakie Co. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 317 (Wyo.1980). The West Virginia Supreme Court stated: "Certainly, the mandatory requirement of a thorough and efficient system of free schools, found in Article XII, Section 1 of our Constitution, demonstrates

that education is a fundamental constitutional right in this State." Paulev v. Kelly, 255 S.E.2d 859, 878 (W.Va. 1979).

The U. S. Supreme Court again looked at a Texas education statute challenged under the Equal Protection Clause in Plyler. The case concerned §21.031 of the Texas Education Code which restricted free public education to children of legally admitted aliens. The Plyler Court noted that, although education was not a "right" guaranteed under the United States Constitution:

> Neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Plyler, 102 S. Ct. at 2397.

> In determining the rationality of Section 21.031, we may appropriately take into account its costs to the nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination ... can hardly be considered rational unless it furthers some substantial goal of the State.

Id. at 2398.

Justice Blackmun made the point even clearer: "Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States, and Rodriguez does not stand for quite so absolute a proposition." Id. at 2403.

Thus Plyler established, post-Rodriguez, a middle level of scrutiny for Federal Equal Protection analysis of education-related classifications. Plyler makes it clear that education should not fall within the general rules for interpreting social and economic legislation. The unique and essential nature of

education continues to be recognized in Federal Equal Protection analysis.

Another recent Supreme Court case makes clear that Rodriguez did not settle for all time all Federal Equal Protection Clause tests of state school financing actions. In Papasan v. Allain, 106 S.Ct. 2932 (1986), the question concerned relatively small differences in state funding to various school districts (differences were in the magnitude of $75 per student). The United States Court of Appeals had dismissed the Equal Protection challenge based on its reading of the Rodriguez case. The Supreme Court reversed, noting that "Rodriguez did not, however, purport to validate all funding variations that might result from a State's public school funding decision." Id. at 2945. Papasan points to the continued vitality of even the Federal Equal Protection Clause to close scrutiny of those parts of the School Finance System which are under state control.

4. The Language and Structure of the Texas Constitution Prove the Fundamentality of Education in Texas

Article VII, section 1 of the Constitution provides:

> §1. Support and maintenance of system of public free schools
>
> Section 1. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Education is distinguishable from other provisions of the Constitution on a more narrow textual basis as well. There is a

specific Education Article in the Texas Constitution and it has been there for more than 140 years. The essential nature of public education and the corresponding state duty has its source in the Texas Declaration of Independence. The Texas Constitution of 1845 contained the explicit "essential ...duty" language. In fact Texas' very admission to the Union was conditioned upon its guarantee of public schooling:

> A sacred compact was entered into by and between the people of Texas and the Congress of the United States that the Constitution of Texas shall never be so amended as to deprive any citizen or class or citizens of the United States of the school rights and privileges secured by the Constitution of said State.

Debates in the Texas Constitutional Convention of 1875 at 338. The very language of Article VII, § 1 makes it clear that education is "essential" [8] and that the Legislature has a "duty" to establish and make suitable provision for an efficient system of public free schools. None of the other provisions cited in the Court of Appeals decision contain language denoting a subject "essential" to the preservation of the liberties and rights of the people of Texas. The Texas Constitution falls squarely within those state constitutions making education a mandatory duty. Seattle School District No. 1 of King County v. State,

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[8] Both at the time of the passage of Art. VII, § 1 in 1876 and at the present, Webster's Dictionary uses "fundamental" as a synonym for "essential." Weoster's 1877, id.

585 P.2d 71, 83-5 (Wash. 1978).

The word "essential" used in Article VII, § 1 is the same used in the Introduction to the Texas Bill of Rights, i.e.

> That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Tex. Const. Ann. art. I, Introduction

One of the reasons for the finding in Rodriguez that education is not a fundamental right under the United States Constitution was a failure to show a nexus between education and the fundamental rights of voting and speech. The nexus between education and the Bill of Rights in Texas is clear. Article VII, §1 states "a general diffusion of knowledge being essential to the preservation of the liberties and rights of the people..." The language of Article VII, § 1 also defeats the Court of Appeals arguments that only matters guaranteed by the Texas Bill of Rights are accorded fundamental status by the Texas Constitution. The Constitution itself states that education is essential to the preservation of the rights guaranteed by the Texas Bill of Rights.

C. WITHIN THE CONTEXT OF A SCHOOL FINANCE SYSTEM, WEALTH IS A SUSPECT CATEGORY

1. The Factual Record in This Case Is Different Than That In Rodriguez, But Was Ignored By The The Court of Appeals

The District Court made significant fact findings on the "concentrations of low income students in low wealth districts." (TR.562-565). The District court also found that it is more expensive to educate these low-income children and that they bring significant educational handicaps with them to school-handicaps which low wealth districts cannot afford to address. (TR.562-65; S.F. 778,827,920,3466,3484).

2. Both State Cases and Federal Cases Support The District Court's For Holding That Wealth Is A Suspect Class In This Case

The Wyoming and California Supreme Courts have specifically held that wealth is a suspect category "especially when applied to a fundamental interest." Washakie Co. Sch. Dist. No. 1, 606 P.2d 310 (Wyo.1980) In Serrano, 557 P.2d at 958, the California Supreme Court affirmed its earlier holding that wealth is a suspect classification in the content of a school finance system. The U. S. Supreme Court has recognized that there are circumstances under which wealth is a suspect classification. In Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, 1081 (1966), the Supreme Court held:

> We conclude that a state violates the Equal Protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.

Harper, 86 S.Ct. at 1082, also held that:

> We must remember that the interest of the state, when it comes to voting, is limited to the power to fix qualifications. Wealth like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race

[citations omitted] are traditionally disfavored. [emphasis added]

3. The State's Classification System Impacts Negatively On a Suspect Class

The Rodriguez case did not find that wealth was a suspect category under the United States Constitution. Nevertheless, it did outline "traditional indicia of suspectness" i.e. characteristics of a group that indicate suspectness, which include groups that are:

1. saddled with disabilities;
2. subjected to a history of purposeful unequal treatment; and
3. relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

a. Saddled with disabilities

In this case, the evidence from both Defendant and Plaintiff witnesses was that low income children bring with them very special disadvantages in education that must be overcome by the educational process. (TR.562-65; passim).

b. History of unequal treatment

The District Court found a set of "historical inequities" (TR.565-66) showing a pattern of a wide variation in property wealth and expenditure and tax rates in school districts; a consistent historical underfunding of low wealth districts; a finding that inadequate funding has had a negative effect on

present day operations of poor districts; a finding that the school finance system denies equal educational opportunity to students in low wealth districts, especially atypical students; and a finding that the system has had a negative impact on the education of students in low wealth districts in terms of their ability to learn, ability to master basic skills, ability to acquire saleable skills, and their quality of life. (TR. 565-66). These show a history of purposeful unequal treatment.

c. Political powerlessness

The District Court found:

> Those individuals of political influence who could impact the political process by and large reside in districts of above average wealth.

(TR. 602).

In this case the state and the wealthy districts sought to prove that additional monies could not be raised for education by the State of Texas without the "political power and superiority" of persons in the high wealth districts. The high wealth districts can exercise political power sufficient to stop any school district finance plan that would be to the disadvantage of the high wealth districts. (Hooker testimony; and S.F. 7347-7358). This demonstrates political powerlessness of the poor and the low wealth districts.

4. Summary

The federal courts have recognized a denial of a fundamental right to a class of persons even if that right was not completely, but only seriously diluted. Slittle v. Streater, 452

U.S. 1, 101 S. Ct. 2202 (1981). Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362 (1963). The Reynolds case held that there was a denial of the fundamental right to vote because of the dilution of that vote under unfair voting districting plans. In Harper, the Court held that:

> to introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. [emphasis added]

Harper, 86 S. Ct. at 1082.

One of the factors noted by the U.S. Supreme Court in determining that, in some cases, wealth is a suspect category is the extent to which the matter involved is "compulsory." See, e.g. Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971) (finding unconstitutional a fee required for divorce because of its discriminatory impact on low income persons). Education in Texas is compulsory.

The general holdings of these Supreme Court cases and other state supreme court cases are that wealth is a suspect classification when a fundamental right is impinged upon by the state's use of a classification based on wealth. In Edgewood, the District Court was presented with overwhelming evidence of the concentration of low income persons in low wealth districts, their political powerlessness, the historical discrimination against them by the School Finance System, and the fundamental nature of education in the State. Based on the factual record and the legal standards supported by the Court in Serrano and

Shapiro v. Thompson, 394 U. S. 618, 89 S. Ct. 1322 (1969), the District Court was correct in finding that wealth is a suspect category.

D. THE TEXAS SCHOOL FINANCE SYSTEM IMPACTS NEGATIVELY UPON IMPORTANT CONSTITUTIONAL RIGHTS AND IS NOT SUBSTANTIALLY JUSTIFIED

The Texas "rational basis test" is a significantly more searching inquiry than is the Equal Protection rational basis standard under federal law. Alternatively, if this Court should find that the school finance system does not need to be reviewed under this strict scrutiny standard and that the system does meet the "rational basis test," then this Court must review the system under a more flexible system than the "two-tiered approach." Even if equal educational opportunity were not a fundamental right and wealth were not a suspect classification, the school finance system cannot be upheld unless it is justified by showing the system furthers some substantial state interest. The federal courts and many state courts have subjected state statutes to a middle level of review between the "strict scrutiny" and the "rational basis" standards. This "mid-level" review has been defined as either a "third-tier," or as a flexible system weighing the interests implicated, the state objectives and the state justifications for its statutory system. Both the federal and state courts have commented on the lack of flexibility of the "two-tier" system of analyzing equal protection cases. Plyler, 457 U.S. at 217. The majority Court of Appeals decision, though holding that education is not a fundamental right, clearly noted

that education is more important than most other matters in the Texas Constitution. [9]

The U. S. Supreme Court has reacted to the limitations of the "two-tiered" analysis by developing a system of "intermediate scrutiny". [10] In Plyler, the Supreme Court required that the Texas statute denying a free education to children of undocumented aliens be subjected to a heightened scrutiny and that such a system be invalidated unless it "furthers some substantial interest of the state." This case is in line with previous U. S. Supreme Court cases applying the heightened or intermediate scrutiny to cases involving gender, [11] illegitimacy, [12] alienage, illegal residency, age, and mental retardation.

Several state supreme courts have also applied the

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[9] "No one, of course, disputes appellees' premise that education is important and that public education has long commanded a central role in the affairs of this State;" (slip op. at 4); "This court, of course, does not suggest that these provisions [other less important matters in Texas Constitution] are on an equal footing with those provisions which concern education, ..."; (slip op. at 5); "Education, without doubt occupies an important place in the maintenance of the State' basic institutions and is certainly a primary vehicle for transmitting the values upon which our society rests." (slip op. at 6).

[10] A leading case in the development of the intermediate scrutiny system involved education in Texas. Plyler.

[11] Craig v. Boren, 429 U. S. 190 (1976)

[12] Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).

intermediate level of review to equal protection cases.[13] For instance, the Washington Supreme Court held that a statute which denied indigent criminal defendants credit for time served in jail between the defendants' arrest and guilty plea denied equal protection since it created a "classification based solely on wealth." Phelan, 671 P.2d at 1213. The Court pointed out that even though the Defendant's right to such credit was non-fundamental, "where deprivation of liberty is due to a defendant's indigency... the application of some enhanced standard of review seems even more clear." Id. at 1215. Such an application is also necessary in the this case, since the classification created is based on wealth. In Attorney General v. Waldron, the highest court of Maryland struck down a wealth-based statute which required retired judges to choose between a pension and the continued practice of law after

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[13] See, e.g., Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986) (finding state statute of repose unconstitutional); Dept. of Civil Rights v. Waterford Township of Parks & Recreation, 387 N.W.2d 821 (Mich. 1986) (ban of female students from basketball program found in violation of equal protection using intermediate standard); Commonwealth v. Bell, 516 A.2d 1172 (Penn. 1986) (applied intermediate standard in upholding state statute); State v. Cook, 679 P.2d 413 (Wash.1984) (applying intermediate standard to pre-trial detainees); State v. Phelan, 671 P.2d 1212 (Wash. 1983) (applying intermediate standard to statute depriving defendant's of credit for time served on basis of wealth); Leliefild v. Johnson, 659 P.2d 111 (Idaho 1983) (employing "means focus" or middle-tier analysis); Sheppard v. State Dept. of Employment, 650 P.2d 643 (Idaho 1982) (applying focus analysis); Attorney General v. Waldron, 426 A.2d 929 (Md.Ct.App.1981) (finding state statute on judges' pensions unconstitutional under intermediate scrutiny).

retirement. Waldron, 426 A.2d at 935. The Attorney General argued that the statute was valid because it served the legitimate purpose of saving the taxpayers' money. Id. at 951. The Court refused to credit that "purpose", and gave the following relevant example:

> [N]o one can dispute that a statute which denied the non-fundamental right of education to members of a non-suspect class of our citizens would reduce the costs of education, yet neither would anyone dispute that this action, undertaken to serve that sole purpose, would represent a manifest breach of the principles of equal protection.

Id.

A thorough analysis of both federal and state equal Protection cases leads to the conclusion that, both federal and state courts are applying a "sliding scale" approach to the problem of looking at the interests involved and considering the classifications made by state legislation. This "sliding scale" was well articulated by the Alaska Supreme Court:

> In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme. As legislation burdens more fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale. Likewise, laws which embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized.

State v. Ostrosky, 667 P.2d 1184, 1192-93 (Alaska 1983) Appeal dismissed, 467 U.S. 1201 (1984).

Once a determination of the competing rights is made the court will examine the "governmental purposes served by the challenged statute and the closeness of the means-to-end fit between the legislation and those purposes." Ostrosky, 657 P.2d at 1193; see also, Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984).

The Montana Supreme Court has also articulated its sliding scale test of equal protection. Butte Community Union v. Louis, 712 P.2d 1309 (Mont. 1986). The Court held that:

> in reviewing the textual discussion by constitutional authorities and the insightful dissents of Justices Marshall, Brennan, Powell and Stevens, we have distilled a test we think is sound. Where constitutionally significant interests are implicated by governmental classification, arbitrary lines should be condemned. Further, there should be balancing of the rights infringed and the governmental interest to be served by such infringement.[14] [emphasis added]

Butte Community Union, 712 P.2d at 1314.

The Montana Supreme Court based its holding on its interpretation that although welfare is not a fundamental right under the Montana Constitution:

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[14] In Butte Community Union, the Montana Supreme Court invalidated a state statute allowing welfare to groups of persons over 50 years of age but not to groups of persons under 50. The Court held that "this court [Montana Supreme Court] need not blindly follow the U. S. Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution." Id at 1313.

> Equal Protection of Law is an essential underpinning of this free society. The old rational basis test allows government to discriminate among classes of people for the most whimsical reasons. Welfare benefits grounded in the Constitution itself are deserving of great protection.

Id.

This form of equal protection review has been developed by Justices on the U. S. Supreme Court.[15]

Equal educational opportunity is a fundamental right in Texas and wealth, in the context of a school finance case, is a suspect classification. Nevertheless if this Court does not so hold, a sliding scale or mid-level review must be given careful consideration by this Court. A simple "yes - no" decision on the importance of an interest under the Texas Constitution does not reflect the variety of interests considered under Texas Constitutional Law or the variety of issues which must come before this Court. To state that education is either like freedom of speech or like water storage facilities simply makes no sense.

E. THERE IS NO RATIONAL BASIS UNDER TEXAS CONSTITUTIONAL LAW FOR THE TEXAS SCHOOL FINANCE SYSTEM

1. Introduction

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[15] Justice Marshall, San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 98-99 (Marshall, J.dissenting); Justice White, Vlandis v. Kline, 412 U. S. 441, 458, 459 (1973) (White J. concurring); City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). (Stevens, M. with Burger J. concurring, at 3270) (Marshall, with Brennan and Blackmun, concurring in part and dissenting in part, at 3262).

The Texas "rational basis test" is a more demanding test for the state than the "rational basis test" applied in the Rodriguez decision. Alternatively, even under the rational basis test applied in the Rodriguez case, the state has not met its burden. The only justification for the discrimination under the Texas School Finance System that was offered by Defendants and found by the Court of Appeals, is "local control." The District Court held that local control is not a sufficient justification. The District Court's findings on the "rationality" of the Texas School Finance System and the "justifications" offered by the state are "factual determinations as to the nature of the state objective and the reasonableness of the means used to achieve it," and "are properly made by the trial court." T.S.E.U., 746 S.W. 2d at 205.

2. The Texas Rational Basis Test

The independence of a state supreme court to interpret its state constitution more broadly than the Federal Constitution has been recognized by both the U. S. Supreme Court and the Texas Supreme Court. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S. Ct. 1070, 1077 (1982). This Court held in Whitworth, 699 S.W.2d at 196 that:

> [s]ubject to adhering to minimal federal standards, we are at liberty to interpret state statutes in light of our own constitution and to fashion our own test to determine a statute's constitutionality.

Whitworth, id. at 197, held that "similarly situated individuals

must be treated equally under this statutory classification unless there is a rational basis for not doing so," and "even when the purpose of a statute is legitimate, equal protection analysis still requires a determination that the classifications drawn by the statute are rationally related to the statute's purpose." Id.

3. Relationship of Classification to Purpose

The avowed purposes of the Texas School Finance System are expressed in Tex. Const. Ann. art. VII, §1, Tex. Educ. Code §§ 2.01 & 16.001 and rules of the State Board of Education, 19 Tex. Adm. Code § 75.

The state has created a system which has been described in Rodriguez by Mr. Justice Stewart, concurring, as follows:

> The method of financing public school in Texas, as in almost every other state, has resulted in a system of public education that can fairly be described as chaotic and unjust.

Rodriguez, 93 S.Ct. at 1310.

The District Court, in both extremely specific and general findings, has found that the state classification system does not meet its avowed purposes. (S.F. and Findings of Fact and Conclusions of Law passim).

Dr. Hooker, a Texas professor with 20 years of experience working on Texas state-wide school finance issues testified that the Texas School Finance System does not meet the objectives of §16.001. (S.F.148).

4. Legal Standards on Local Control

"To make the quality of a child's education dependent upon the location of private commercial and industrial establishment... is to rely on the most irrelevant of factors as the basis for educational financing." Serrano, 487 P.2d at 1253. Local property wealth "bears no rational relationship to the educational needs of the individual districts...", Dupree, 651 S.W.2d at 30. The state is unable to demonstrate any articulable nexus between a desire for local control of schools and a need to maintain these stark conditions of inequality. The plain fact is that local control is a:

> cruel illusion for the poor school districts due to limitations placed upon them by the system itself...only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.

Serrano, 487 P.2d at 1260; Dupree, 651 S.W.2d at 30.

"Although local control of public schools is a legitimate state objective , since local control of education need not be diminished if the ability of towns to finance education is equalized, the local control objective is not a rational basis for retention of the present financing system." Horton, 376 A.2d at 370. "No matter how the state decides to finance its system of public education, it can still leave this decision-making

power in the hands of local district." Serrano, 487 P.2d at 1260. Defendants have not shown otherwise.

That the future of education in Texas as we approach the 21st century should be forever constrained by the supposed notion of simplicity in a by-gone age is inconsistent with the teachings of the Texas Supreme Court and other state courts. Mumme v. Marrs, 40 S.W. 2d 31, 36 (Tex.1931) tells us that the word "suitable" "is an elastic term, depending upon the necessities of changing times or conditions..." As the Washington Supreme Court has noted:

> (t)o suggest that the state fulfills its duty...by merely providing more acceptable educational facilities than those of 1889 is utter nonsense. We cannot ignore the fact that times have changed and that which may have been "ample" in 1889 may be wholly unsuited for children confronted with contemporary demands wholly unknown to the constitutional convention. ...We must interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied...

Seattle School District, 585 P.2d at 94; Accord, Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973); Dupree, 651 S.W.2d at 93; Horton, 376 A.2d at 273.

5. Summary

The District Court studied:

> the system in its entirety, including both State funding formulas as well as local district configurations and the wealth of those districts and how these factors interact to create the STate system of funding public education.

(TR.592). This is precisely the examination which courts have made in other school finance cases--an examination of "the entire system from organization of school districts through tax bases and levies and distribution of foundation funds, all of which have bearing upon the disparity which exists." Washakie, 606 P.2d at 335; Robinson, 303 A.2d at 294; Serrano, 487 P.2d at 1250-1251. The bottom line is that the State must bear responsibility for the results of the school finance system.

> Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands... If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must meet its continuing obligations.

Robinson v. Cahill, id. at 294.

F. THERE IS NO COMPELLING INTEREST IN THE SCHOOL FINANCE SYSTEM, IT IS NOT SUBSTANTIALLY JUSTIFIED, AND THERE IS NO RATIONAL BASIS FOR IT

The District Court "could not detect in the evidence or the law a compelling reason or objective that would justify continuation of the discrimination" in the school finance system. (TR.538). Texas did not follow any rational or articulated policy in the creation and development of school district boundaries. (TR.573). The "local control" argument is factually insufficient "to justify the discrimination found in the State's system of funding public education; (TR.575-76); it is not a compelling interest. (TR.578). The system is not rationally related to legitimate state purposes. (TR.599).

These are fact findings of the District Court and entitled to the deference due all other fact findings. T.S.F.U.

II. THE COURT OF APPEALS HOLDING THAT ARTICLE VII, §3 AUTHORIZES THE PRESENT SCHOOL FINANCE SYSTEM VIOLATES RULES OF CONSTITUTIONAL CONSTRUCTION, TEXAS HISTORY, TEXAS SUPREME COURT CASES, THE PLAIN LANGUAGE OF THE STATUTE, OTHER STATE SUPREME COURT CASES AND COMMON SENSE

A. APPLICABLE RULES OF CONSTITUTIONAL CONSTRUCTION DO NOT SUPPORT THE PROPOSITION THAT ARTICLE VII, §3 AUTHORIZES THE PRESENT SCHOOL FINANCE SYSTEM.

Basic rules of Constitutional Construction were cited by the dissent in the Court of Appeals decision:

> In determining original intent, we look first to the literal text of the provision in question and attempt to determine how it would have been understood by a voter of ordinary intelligence at the time of its adoption. Cramer v. Sheppard, 167 S.W. 2d 147, 152 (Tex. 1943). Where the terms of the provision are clear, that which the words declare is the meaning of the provision, unless such a literal interpretation would lead to a result not intended by the voters. See 16 C.J.S., Constitutional Law § 23 at 82 (1984); C. Antineau, supra, § 2.04; H. Black, Construction and Interpretation of the Laws 15 (1896). When determining whether a certain interpretation should be given the language of a provision, it is proper to consider whether the voters who adopted it would have intended the consequences which must follow such interpretation. Koy v. Schnieder, 218 S. W. 479, 481 (Tex.1920). If the text is ambiguous, we try first to ascertain its meaning by examining other parts of the Constitution. Cox v. Robinson, 150 S.W. 1149, 1151 (Tex.1912).
>
> Constitutional provisions must be interpreted in a manner to give effect to every phrase of the document; no provision ordinarily duplicates another, and provisions should not be interpreted so as to be rendered meaningless. In the Interest of McLean, 725 S.W.2d 696 (Tex. 1987); Hanson v. Jordan, 198 S.W. 2d 262, 263 (Tex. 1946).
>
> One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require

> if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.

1 T. Cooley, supra at 127-129. In other words, all parts of the Constitution must be interpreted, if possible, so that they are in harmony. Clapp v. State, 639 S.W. 2d 949, 951 (Tex. Cr. App. 1982).

> If, after examining the entire document, we are still unsure of the meaning of a particular provision, then we may consider, with hesitation and circumspection, such extraneous factors as the social and political conditions existing at the time of adoption, the apparent evil to be remedied or purpose to be achieved, and (as a last resort) the statements of the drafters. Mumme v. Marrs, 40 S.W.2d 31, 35 (Tex.1931); 1 T. Cooley, supra at 141-142, 171; 16 C.J.S., Constitutional Law § 30 (1984). If a constitutional provision is finally open to more than one interpretation, it must be interpreted equitably so as not to lead to absurdity or unjust discrimination. Cramer v. Sheppard, supra at 155; Sargeant v. Sargeant, 15 S.W. 2d 589 (Tex. 1929).

Kirby v. Edgewood, slip op., dissent at 11-12.

"No amount of acquiescence can legalize a usurpation of power or defeat the will of the people, plainly expressed in the Constitution." Kimbrough v. Barnett, 55 S.W. 120 (Tex.1900); Ex Parte Heyman 78 S.W. 349 (Tex. 1909). Shephard v. San Jacinto Junior College District, 363 S.W.2d 742, 762 (Tex. 1963) (Calvert dissent). Later provisions of the Constitution are to be given control and effect, "but this rule will only be applied upon a determination that it is impossible to harmonize the provisions by any reasonable construction which will permit them to stand together." Collingsworth County v. Allred, 40 S.W.2d 13, 15 (Tex. 1931).

B. THE PLAIN LANGUAGE OF ARTICLE VII, §3 CAN ONLY BE INTERPRETED TO MEAN THAT IT DOES NOT AUTHORIZE THE PRESENT INEFFICIENT AND IRRATIONAL SCHOOL FINANCE SYSTEM

Article VII, § 3 states that the Legislature may also provide for the formation of school district [sic]. Article VII, §3 also says that "the legislature may authorize an additional ad valorem tax to be levied and collected within all school districts..." When Art. VII § 3 was enacted in 1883, the word may meant what it means now as follows:

> may, v. [imp. MIGHT]... an auxiliary verb qualifying the meaning of another verb by expressing (a.) Ability, competency or possibility... (b) moral power, liberty, permission allowance ... (c.) Contingency or liability "the possibility or probability of occurrence as given in the known laws of nature or mind"... (d) Modesty, courtesy, or concession, or a desire to soften a question or remark... (e) Desire or wish as in prayer imprecation, benediction and the like.

American Dictionary of the English Language, Noah Webster, LLD. (1883), p.832 (Webster) same as American Dictionary of the English Language, Noah Webster, LLD (1877). On the other hand, Art. VII, §3 use the word "shall" [16] when relating the duty of the Legislature to set aside parts of state revenue and the poll tax for education and referring to the Legislature's authority to pass laws for the assessment and collection of taxes in all said districts. In 1877 "shall" meant:

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[16] This court recognized the power of the word "shall" in the 1876 Texas Consitution in LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986). "Shall is mandatory language," LeCroy, 713 S.W.2d at 339.

> Shall, v.i. & auxiliary [imp.SHOULD...] 1. To owe; to be under obligation for ... 2. as an auxiliary, shall indicates a duty or necessity whose obligation is derived from the person speaking; as you shall go; he shall go that is, I order or promise you're going. It thus ordinarily expresses this, in the second and third persons, a command, a threat, or a promise...

(1877) at 1212.

The Texans of 1876 and 1883 had a choice. They could have required the Legislature to create school districts and required the Legislature to allow those school districts to tax, but only allowed the Legislature to itself raise revenues for education or maintain an efficient system of public free schools. They could have required the Legislature to raise money for the schools and required the Legislature to establish and make suitable provisions for schools. The people did the latter in plain language. The people did not do the former, and the Court of Appeals' effort to rewrite the Constitution should be rebuffed.

C. THE MAJORITY OPINION MISINTERPRETS THE HISTORY OF ARTICLE VII, §3

The Constitutions of Texas, at least as far back as 1845 required the Legislature to support and maintain free schools "by taxation on property." The 1869 Constitution, unlike the 1876 Constitution, (the present Constitution), provided for school districts. Article IX, § 7, Texas Constitution of 1869. Art. IX, § 7 1869 Constitution provided that:

> the Legislature shall, if necessary, in addition to ... provide for the raising of such amount by taxation in the several school districts in the state, as will be

> necessary to provide the necessary school houses in each district and ensure the education of all the scholastic inhabitants of this several districts.

The 1876 Constitution, however, did not provide for school districts or provide for taxation from school districts. The 1876 Constitution did provide for statewide funding of public schools putting the duty squarely on the Legislature to raise funds and in fact requiring taxes for funds to be spent on the public schools at a statewide level.

In 1882 the Texas Supreme Court held that the Legislature could not allow, and school districts could not levy, taxes in school districts unless specifically provided for in the State Constitution. City of Fort Worth v. Davis, 57 Tex. 225 (Tex. 1882). As a reaction to the City of Fort Worth case the Legislature proposed and the people passed an amendment in 1883 which allowed the Legislature to create school districts and allowed the Legislature to allow those school districts to set ad valorem taxes. Both in 1876 and in 1883 there was no tremendous disparity in the property wealth of school districts in Texas. This was before the discovery of oil, power plants and shopping centers in Texas. In 1908, the Texas Supreme Court again found that actions of the Legislature in drawing up districts were unconstitutional. Parks v. West, 111 S.W.726 (Tex. 1908). In response to this decision the Legislature and the people again amended Article VII, § 3 to allow school districts to extend into more than one county. Nevertheless the language that the

legislature "may" create school districts and "may" allow the school districts to tax has never been changed.

The history of Article VII, § 3 was described in both the majority and dissent opinions and Shepherd v. San Jacinto Junior College, 363 S.W.2d 742 (Tex.1963). Article VII, § 3 has been described as a "patched up and overly cobbled enactment" and a confused mishmash. Shepherd, and Braden THE CONSTITUTION OF THE STATE OF TEXAS; ANNOTATED AND COMPARATIVE ANALYSIS (1977) at 512-13. The historical analysis of Article VII, §3 and its interpretation as "patched up and overly cobbled" certainly do not support it as a basis for a denial of rights clearly stated in the Texas Equal Protection Clause, Art. I, § 3 and the Texas Education Clause, Art VII, § 1. The "purpose of [Art. VII, § 3] was to give the Legislature a free hand in establishing independent school districts," State v. Brownson, 61 S.W. 114 (Tex. 1901).

D. STATE SUPREME COURTS HAVE REFUSED TO ALLOW SCHOOL DISTRICT TAXATION CONSTITUTIONAL PROVISIONS TO AUTHORIZE SCHOOL FINANCE SYSTEMS WHICH VIOLATE EQUAL PROTECTION AND GENERAL SCHOOL CLAUSES

Other states with constitutional provisions allowing local school district taxes have not found these local tax provisions to insulate the state from its duties under the generals school clause of the state constitution. Serrano, 557 P.2d at 955-57; Dupree, 651 S.W.2d 90. In Serrano, the State Government argued that the state constitutional provision allowing the legislature to draw school districts and allowing the state to have those